IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-2083

RUTH RUSHEN, Director, California Department of Corrections; JESS MARQUEZ, Superintendent, California Medical Facility, Vacaville, California,

Petitioners,

v.

JOHNNY SPAIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUIN DENVIR
State Public Defender
1390 Market Street, Suite 425
San Francisco, California 94102
Telephone: (415) 557-1600

DENNIS P. RIORDAN
Acting Deputy State Public Defender
396 Hayes Street, Suite 2
San Francisco, California 94102
Telephone: (415) 431-3472

BENJAMIN DREYFUS
CHARLES GARRY
Attorneys at Law
1256 Market Street
San Francisco, California 94102
Telephone: (415) 864-3131

Counsel for Respondent

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The respondent JOHNNY SPAIN respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

JURISDICTION

Respondent accepts petitioners' statement of jurisdiction in this case.

QUESTION PRESENTED

1. Where the state has conceded that a petitioner for habeas corpus suffered a deprivation of his Sixth Amendment right to counsel at his state court trial, and the lower federal courts, applying a correct legal standard, have decided unanimously the error requires reversal of that petitioner's conviction, should this Court grant

certiorari to review a mixed question of fact and law, the resolution of which has no precedential significance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioners' statement of the provisions relevant to this case.

STATEMENT OF THE CASE

Respondent accepts petitioners' description of the procedural history of the case, but adds that petitioners have failed to seek a stay of respondent's impending state court retrial in either the Court of Appeals or this Court. Respondent offers the following statement of facts relevant to the right to counsel issue:

Jury selection at respondent's trial was protracted. A chief concern of all defendants was that the jurors seated not have incidents of violence in their background which might impede their ability to weigh impartially evidence concerning the events of August 21, 1971. Since respondent had once been a member of the Black Panther Party, respondent and his trial counsel were equally concerned whether prospective jurors had perceptions of the Black Panthers which would lead them to judge respondent on the basis of those subjective opinions rather than the evidence introduced at trial.

Consequently, all jurors were asked whether they had any "knowledge of crimes of violence" or any associations of the Black Panther Party with violence. All jurors seated testified that they did not. Juror Patricia Fagan specifically denied associating the Black Panther Party "with any form of violence in [her] mind." These representations on her part proved to be inaccurate.

During trial, juror Fagan met in chambers with the trial judge and revealed to him that she believed her

close friend had been murdered by one Pratt, a member of the Black Panther Party, who she believed to be the subject of the testimony of a witness at trial. This testimony had brought Fagan close to an emotional breakdown in court. The judge, advising her to forget the matter, revealed neither the occurrence nor the substance of this communication to respondent or his counsel, nor were the in-chambers discussions recorded in any manner.

That night, juror Fagan asked her mother whether Pratt was in fact the Black Panther who had been convicted of killing her friend, and was told he was. She then met again with the trial judge, told him she had confirmed that the Black Panther being discussed in court had been convicted of killing her friend, and stated she feared that further discussion of this individual would cause her to cry in court. She said to the trial judge that she was not sure she could follow his admonition to put the matter out of her mind.

When discussing the matter with Fagan, the trial court asked her whether she would be affected by the incident in judging the case and Fagan replied in the negative. The judge conceded, however, and the state Court of Appeal found,[1/] that it did not dawn on him that Fagan had revealed that her answers to pre-trial voir dire questions had been inaccurate or incomplete. In fact, she did have an incident of violence in her background; that incident was associated in her mind with the Black Panthers; and her emotional reactions to that incident, once provoked, were so strong that they had brought her to the verge of tears in the courtroom. Since these facts

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1. See Appendix C attached to Petitioner's Petition for Certiorari, at 20-21 (hereafter referred to as Appendix C).

did not occur to the trial judge, he did not explore them in questioning Fagan as to whether she should continue to sit on the jury.

The second meeting, as with the first, was held in camera and not recorded. Juror Fagan subsequently informed other jurors during the trial of her belief that a Black Panther had killed her close friend.

Respondent, the only Black Panther on trial, was the only person convicted of conspiring with George Jackson, also a Black Panther. He also was convicted of the two murders which the evidence demonstrated Jackson committed.

REASONS WHY THE WRIT SHOULD BE DENIED

By this petition for a writ of certiorari, petitioners seek review by this Court of an unpublished, unanimous Ninth Circuit opinion, some five hundred words in length, issued by Judges Sneed, Goodwin, and Jameson.[2/] That opinion did not resolve a single issue of law. The Ninth Circuit was not called upon to determine whether respondent Spain's constitutional rights were violated at the state court trial which resulted in the conviction he challenged on federal habeas corpus, because the petitioners conceded that Spain had been deprived of his right to counsel during state proceedings. In reviewing that error, the Ninth Circuit employed the legal standard urged upon it by petitioners, that of Chapman v. California, 386 U.S. 18 (1967), rather than that suggested by respondent.[3/]

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2. Judge Jameson, a Senior Judge of the District of Montana, sat on the case by designation.

3. Respondent, while demonstrating that he was entitled to relief under Chapman, had also argued that deprivation of the right to counsel during trial requires reversal per se, citing Gideon v. Wainright, 372 U.S. 335 (1963) and Geders v. United States, 425 U.S. 80 (1976). California generally applies the reversal per se standard in cases involving right to counsel violations. See, e.g., People v. Carroll, 140 Cal.App.3d 135 (1983); People v. Locklar, 84 Cal.App.3d 224 (1978).

Consequently, in seeking certiorari, petitioners can make no claim that this case presents this Court with an opportunity to resolve a conflict between a decision of the Ninth Circuit and those of other courts of appeals. U.S. Sup. Ct. Rule 19(b). Nor can it claim that the lower court has decided any question of law, much less an important one that should be settled by this Court; nor ". . . has decided a federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Ibid.

Rather petitioners ask that this Court grant certiorari in order to engage in the process of applying a settled legal principle -- the Chapman standard of requiring reversal unless a constitutional error is proved harmless beyond a reasonable doubt -- to the specific facts of this case.[4/] This Court should decline to do so for four reasons.

First, the determination of the District Court, affirmed by the Court of Appeals, that the constitutional error in this case had not been proven harmless beyond a reasonable doubt rested on a lengthy review of the record and evidence in this case. By their petition petitioners necessarily request this Court to engage in that same onerous undertaking. This Court has stated, however, that it does ". . . not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925).

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4. The Chapman standard applied by the Court of Appeals is to be distinguished from the irrebutable presumption applied by the lower court which led to reversal in Smith v. Philips, 455 U.S. 209 (1982). Use of a conclusive presumption of bias would have been correct in this case, however, since, unlike Smith v. Philips, it involved a violation of Sixth Amendment rights. 455 U.S. at 224 (O'Connor, concurring).

Second, although the question of whether a constitutional error has been proved harmless beyond a reasonable doubt is a mixed question of fact and law,[5] rather than a pure question of fact,[6] it is a "fact-intensive" issue that has been resolved in respondent's favor by both the District Court and a unanimous Court of Appeals.[7] As is true of purely factual determinations, the concurrence by the Court of Appeals in the District Court's Chapman finding should render the case unsuitable for review by this Court. See, e.g., Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). (Supreme Court cannot undertake to review concurrent findings of fact by two courts in the absence of a very obvious and exceptional showing of error.)

Third, the Chapman issue regarding the right to counsel violation is not ultimately dispositive of this action. The District Court found alternative grounds existed for granting respondent the relief he sought, grounds the Court of Appeals, in affirming, did not reach. Appendix B, at 87-93; Appendix A, at 5.

Fourth, the lower federal courts were absolutely correct in ruling that the state had failed to prove the right

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5. Hinman v. McCarthy, 676 F.2d 343 (9th Cir. 1982); Imbler v. State of California, 424 F.2d 631 (9th Cir. 1970).

6. As a mixed question of fact and law, rather than one of historical fact, the determination whether the right to counsel violation was harmless was one to be decided by the federal courts without deference to the prior ruling by the state courts on the same subject. Sumner v. Mata, 455 U.S. 591, 597 (1982); Chapman v. California, 386 U.S. 18, 21 (1967); Townsend v. Sain, 372 U.S. 293, 318 (1963). The historical facts underlying respondent's claim were not in dispute, and the District Court both presumed correct and accepted those findings made by the state Court of Appeal. See Appendix B, at 5.

7. See New York v. Kleppe, 429 U.S. 1307, 1311 (1976) (Mr. Justice Marshall, in chambers) (Four justices would not vote to grant certiorari "on such a fact-intensive issue").

to counsel violation harmless. The trial judge conceded that he never explored with juror Fagan in their in camera meetings the critical question of whether she might be biased against Spain due to his Panther connections because it never occurred to him to do so.

Nor could the hearing on respondent's motion for a new trial compensate for defense counsel's absence from the in camera conferences. Juror Fagan was questioned by respondent's counsel about the events at issue here only after many months had expired and a verdict had been rendered in the case, at a time when all evidence of the effect of those events on her ability to judge the case fairly was inadmissible under California law.[8/] No evidence of any kind was offered by the prosecution concerning the number, identity, or impartiality of the potentially tainted jurors with whom Fagan had discussed her belief that a Black Panther leader killed her close friend.

Finally, petitioners appear to argue that this Court should accept this case and reverse the Ninth Circuit's decision to discipline that appellate court for its past errors in Mata v. Sumner, 649 F.2d 713 (1981) and Mata v. Sumner, 611 F.2d 754 (1979). Whether it is proper to argue that this Court should review a lower court opinion not otherwise suitable for its consideration in order to punish that opinion's authors for past misdeeds is questionable. Such an argument in this case is surely misdirected.

In both Mata I and Mata II, supra, Judge Sneed dissented from the holding of the Court of Appeals. This Court reversed each of those decisions, each time expressing

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8. The state Court of Appeals ruled that Fagan could not testify at the hearing on respondent's motion for a new trial concerning the effect of the "Olson incident" on "her mental attitude in arriving at the verdicts." Appendix C, at 33.

its preference for the views of Judge Sneed over those of the lower court majority. Sumner v. Mata, 455 U.S. 591, 596, n. 8 (1982); Sumner v. Mata, 449 U.S. 539 (1981). Yet Judge Sneed was one of the authors of the Court of Appeals opinion in this case. Petitioner's charge that the lower court whose decision it seeks now to challenge is one which has failed or refused ". . . to accept this Court's leadership in the area of federal-state relations"[9] does a grave injustice to the members of the Court of Appeals panel in this case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: September 21, 1983.

Respectfully submitted,

QUIN DENVIR
State Public Defender

DENNIS P. RIORDAN
Acting Deputy State Public Defender

BENJAMIN DREYFUS
Attorney at Law

CHARLES GARRY
Attorney at Law

By Dennis P. Riordan
DENNIS P. RIORDAN

Counsel for Respondent

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9. Petitioner's Petition, at 51.

PROOF OF SERVICE BY MAIL -- 1013(a), 2015.5 C.C.P.

Ruth Rushen; Jeff Marquez v. Johnny Spain, N. 82-2083

I am a citizen of the United States; my business address is 396 Hayes Street, San Francisco 94102. I am employed in the City and County of San Francisco, where this mailing occurs; I am over the age of eighteen years and not a party to the within cause. I served the within

RESPONDENT'S BRIEF IN OPPOSITION

on the following person(s) on the date set forth below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail box at San Francisco, California, addressed as follows:

JOHN VAN de KAMP
Attorney General of the
State of California
6000 State Building
San Francisco, California 94102

Attn: Ronald E. Nivera
Deputy Attorney General

I certify or declare under penalty of perjury that the foregoing is true and correct.

Executed on September 21, 1983

at San Francisco, California.

Dianne D Brennan

Signature

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

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MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, JOHNNY SPAIN, by and through his counsel, asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

The affidavit of respondent in support of this motion is attached hereto and incorporated herein.

DATED:

Dennis P. Riordan

DENNIS P. RIORDAN
Acting Deputy State Public Defender

Counsel for Respondent

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JOHNNY SPAIN, Respondent.

AFFIDAVIT

I, JOHNNY SPAIN, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the respondent in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said cause. 5. The nature of said cause is briefly stated as follows:

On October 1, 1976, I was sentenced to life imprisonment for first degree murder and conspiracy to escape in the Superior Court of California, County of Marin. A petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging those convictions was subsequently filed in the United States District Court for the Northern District of California. That petition was granted by that Court and that judgment was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit on the ground that I had been deprived of my constitutional right to counsel during my state court trial. I have made no in forma pauperis application to any lower court.

Johnny Spain
JOHNNY SPAIN

Duly witnesses and sworn to before me, a Notary Public, this 12 day of September, 1983.

Notary Public

OFFICIAL SEAL
CATHY R. KORNBLITH
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN FRANCISCO COUNTY
My Commission Expires Nov. 8, 1985